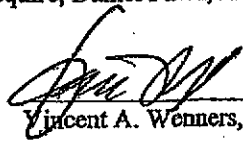


CERTIFICATION

I hereby certify that a copy of the within Memorandum of Law has this date been forwarded to James A. Normand, Esquire, Ovide Lamontagne, Esquire, Daniel Pacik, Esquire and Ruth Tolf Ansell, Esquire, opposing counsel.



Vincent A. Weners, Jr., Esquire

COPY

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT
04-E-0251

Edward J. Burke

v.

Bunny's Superette, Inc., Thomas M. Burke,
Marie I. Burke and Bernardine P. Donelson

CHRONOLOGY

- February, 1996 Slip found under the cash register regarding cash receipts.
- January 7, 1999 Marie Burke forms an Irrevocable Trust and a pour-over will, leaving the stock in Bunny's Superette, Inc. and the land and buildings on Pine Street to Thomas Burke; and the interest only on \$100,000.00 to the Plaintiff, Edward Burke; and the residue to Bernardine P. Donelson.
- March 22, 1999 Marie Burke conveys all of her real estate to the Trust.
- March 17, 2004 The Marie Burke Trust conveys the land and buildings on Pine Street on which Bunny's Superette, Inc. is situated to Thomas Burke.
- March, 2004 Thomas Burke, Bernardine Burke and Marie Burke discuss, at Marie Burke's home, the gift of their stock in Bunny's Superette, Inc. to Thomas Burke.
- April 1, 2004 Marie Burke and Bernardine Donelson sign gift letters of stock brought to them by Thomas Burke and addressed to David Dunn, Esquire.
- April 5, 2004 The First Amendment to the Marie Burke Trust is signed, leaving the stock in Bunny's Superette, Inc. only to Thomas Burke (the land having been conveyed to him); reducing the gift to the Plaintiff, Edward Burke to \$60,000.00; and the residue to Bernardine Donelson.

May, 2004	Thomas Burke sends Attorney David Dunn an undated letter requesting a special meeting to elect him as the sole officer and director of Bunny's Superette, Inc. and to amend the Bylaws to delete the June 28, 1971 Stock Purchase Agreement.
May 6, 2004	Plaintiff, Edward Burke, receives a copy of the undated letter and proposed corporate changes.
June 8, 2004	Plaintiff, Edward Burke, files a Petition for Injunction.
June 29, 2004	Marie Burke executes the Second Amendment to her Trust intentionally making no provision for the Plaintiff, Edward Burke.
September 3, 2004	The Third Amendment to the Marie Burke Trust is signed appointing Thomas Burke as alternate Trustee, and providing that Bernardine's residual stock be in trust to be distributed in Thomas' sole discretion.

000095

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS

NORTHERN DISTRICT

SUPERIOR COURT

Docket No. 04-E-0251

Edward J. Burke

vs.

Bunny's Superette, Inc., Thomas M. Burke, Marie I. Burke
and Bernardine P. Donelson

POST-TRIAL MEMORANDUM SUBMITTED BY
MARIE I. BURKE AND BERNARDINE P. DONELSON

NOW COME Respondents, Marie I. Burke and Bernardine P. Donelson, by and through their attorneys, Ansell & Anderson, P.A., and respectfully submit the following Post-Trial Memorandum:

INTRODUCTION

This case arises from a dispute between the shareholders of Bunny's Superette, Inc. (hereinafter referred to as "Bunny's Superette"). The plaintiff, Edward J. Burke, seeks permanent injunctive relief to enjoin Marie I. Burke and Bernardine P. Donelson from transferring their shares in Bunny's Superette to Thomas M. Burke. The plaintiff alleges that the parties had entered into an agreement in 1971 to transfer the unincorporated grocery store owned by them (and known as Bunny's Superette) to a corporation organized in such a manner that the three children would be equally treated with respect to their parent's estates, including, but not limited to, the business, the land and building on which it was situate. The plaintiff further alleges that the parties had entered into a stock restriction agreement which gave him the right to purchase certain shares which were being sold, and that on April 1, 2004 both Marie Burke and

Bernardine Donelson transferred their shares to Thomas Burke without affording the plaintiff the opportunity to purchase these shares.

The defendants deny that any agreement existed in which the parties agreed that the three children would be equally treated with respect to their parents' estates, including but not limited to the business, land and building on which it was situate. The defendants also deny that the transfer of stock violates the stock restriction. Bunny's Superette has filed a counterclaim against the plaintiff for payment of \$36,566.00 plus interest, which is owed for prior advances made to the plaintiff.

STATEMENT OF FACTS

A. Bunny's Superette Prior to 1971

Marie and Bernard Burke first established a grocery store called Bunny's Superette in approximately 1952. At the time it was formed, the Burkes had three young children: Bernardine Burke (aka "Bunny") who was twelve years old, Edward Burke who was 10 years old and Thomas Burke who was 6 years old. Although Bunny's Superette was considered a family business, there was never any dispute that Marie and Bernard Burke were the legal owners of the business. Marie and Bernard Burke made all of the financial decisions about the business and received all of the profits.

During their childhood, each of the Burke children worked at the business, without pay, but Marie Burke and Bernard Burke provided their children with all of their necessities (food, shelter, clothing), as well as spending money and use of family vehicles. There was no obligation or requirement for the children to work at the store. The children were encouraged to play sports, to spend time with their friends and to do other extracurricular activities. Edward

Burke was actively involved in youth baseball, and Bernard Burke formed an organized baseball team for Edward to join.

All of the Burke children continued to work at the business on a full time and/or part time basis for some period of time after graduating from high school. There was also never any obligation and/or expectation that they would continue working at the store during their adulthood. Marie and Bernard Burke encouraged all of their children to go to college, and also encouraged their children to pursue careers outside of Bunny's Superette.

Bernardine Donelson and Thomas Burke took advantage of these opportunities. Marie and Bernard Burke paid for Bernardine Donelson to attend college at Notre Dame College. After college, Bernardine Donelson was a teacher for several years and received her Masters Degree from the University of Illinois. Bernardine Donelson eventually returned to New Hampshire, where she became a real estate agent. Bernardine Donelson continued to work at Bunny's Superette on an infrequent basis to assist when necessary. However she never returned to the store on a full-time basis.

Marie and Bernard Burke also paid for Thomas Burke to attend college at New Hampshire College. After college, Thomas Burke joined the National Guard Officer Program. Thomas Burke was on active duty for several years, and ultimately returned to work in New Hampshire. Marie and Bernard Burke encouraged Thomas Burke to interview for jobs outside Bunny's Superette in New Hampshire, although Thomas Burke ultimately decided to work at Bunny's Superette. After returning to Bunny's Superette, he received a salary.

Edward Burke was also encouraged to go to college and/or to pursue a career outside of Bunny's Superette, but he chose to continue to live at home and to work at the business after high school. During that time period, Marie and Bernard Burke continued to pay for all of

Edward Burke's living expenses, provided him spending money and gave him use of the family vehicle. Edward Burke married in 1966, and moved out of his parent's home. After that date, he received a salary for his work at the store.

Prior to the incorporation of Bunny's Superette in 1971, Edward Burke, Bernardine Donelson and Thomas Burke were not owners of Bunny's Superette. All of the financial decisions were made by Marie and Bernard Burke, and they received all of the profits (and paid all of the expenses) of the store. Edward Burke, Bernardine Donelson and Thomas Burke were never promised an ownership interest and/or future inheritance if they continued to work at Bunny's Superette.¹ There was also never an agreement with respect to who would ultimately own and/or inherit the store.

B. Bernard Burke's Death in 1971 and the Incorporation of Bunny's Superette, Inc.

In 1970, Bernard Burke suddenly became ill, and he ultimately died on May 12, 1971. See T. Burke Exhibit A (certified copy of the estate of Bernard P. Burke). Bernard Burke's will provided that one dollar would be given to each of his children, and that Marie Burke would receive the remainder of his estate. See id. As the surviving joint tenant, Marie Burke also became the sole owner of the properties which had been purchased during her marriage, including 121 Arah Street, 18 Rockland Avenue, 68 Webster Street, 77 Webster Street and 753 Pine Street. See id.

According to Edward Burke, soon after Bernard Burke passed away, Edward Burke approached his mother and informed her that Bernard Burke had promised him the store. Marie Burke was surprised by this proclamation, and informed Edward Burke that the store belonged

¹ In fact, although Edward Burke alleges that he was told that he had an ownership interest (or right to future inheritance) in Bunny's Superette, he admitted at trial that this alleged ownership interest and/or future inheritance was not contingent upon his continued work at the store.

exclusively to her. Marie Burke also asked Edward Burke for some documentation of Bernard Burke's alleged statement that Edward Burke was a co-owner and/or would receive the store through inheritance. Edward Burke informed Marie Burke that he did not have any documentation, and Marie Burke refused to acknowledge any ownership interest that Edward Burke claimed in the store and/or the properties. Edward Burke never brought a lawsuit in probate or superior court to enforce the alleged promise made by his father, Bernard Burke.

In 1971, Bunny's Superette was incorporated for the purpose of buying, selling, trading and dealing (at wholesale and retail) produces which are incidental to a general food supply and provision business. See Petition for Injunction at Exhibit A (State of New Hampshire Incorporation Documents). Land and buildings were not included in the incorporation of the business assets. Id.

At that time, Edward Burke approached Attorney Charlie Dunn and provided him with all of the necessary information to incorporate Bunny's Superette. Although Marie Burke was under no obligation to give her children an interest in Bunny's Superette, at the suggestion of Bernardine Donelson, she decided to gift a 25% interest in the business to each of her children. Shares were issued to all of the parties at the organizational meeting on June 28, 1971. See Petition for Injunction at Exhibit B (record of organization).

All of the parties were in attendance at the organizational meeting of the corporation, although none of them specifically recall it. This meeting provided an opportunity for the parties to discuss the various provisions of the incorporation documents, including the stock restriction which limited sale of the stock. There has never been any dispute that the sole purpose of this stock restriction was to limit the ability of an outsider (i.e., individuals outside the family) from

buying an ownership interest in the store. Each of the parties testified that they never considered a gift of the property within the family.

At the incorporation meeting, the parties entered into an agreement to adopt a written stock restriction which provides that:

In the event that any stockholder during his lifetime desires to sell any of his stock, he shall first offer it or such part of it as he wishes to sell, to the corporation at the 'agreed price' . . . and the corporation shall have sixty (60) days to accept or reject the offer. If the corporation rejects the offer, the offer shall be repeated to the other stockholders in proportion to their holdings and said stockholders shall have sixty (60) days to accept or reject the offer. If the other stockholders reject the offer, then the holder shall be free to sell said stock to any other party, which party shall take subject to this restriction.

Id.

The corporate documents do not provide any support for Edward Burke's claim that he, Bernardine Donelson and Thomas Burke became owners and/or would ultimately inherit Marie Burke's estate. At trial, Edward Burke nonetheless testified that there was an agreement that all of the properties owned by Marie Burke at the time of her husband's death and/or purchased by her after her husband died were left in Marie Burke's name during her lifetime to enable her to receive income from the rental properties (and for tax purposes), and that after her death, these properties would be owned by her children. Not only do the defendants steadfastly deny that any such agreement was ever made, but all of the facts and circumstances indicate that Marie Burke was the sole owner of these properties after 1971, without restriction.

There is no evidence that Marie Burke intended to give any interest in her real property to her children in 1971.² Marie Burke retained all of these properties for her exclusive benefit. All

² In order to have a valid gift, the donor must have a "manifest intention" to give. See DeGrandpre, 7 New Hampshire Practice: Wills, Trusts and Gifts, 3d Ed., § 37-4 (citing Humiston v. Bushnell, 118 N.H. 759, 761 (1978)); 38 Am. Jur. 2d Gifts § 18 (1999) (a "clear, unmistakable, and unequivocal intention" of the donor is

of the income and expenses resulting from these properties were administered through Marie Burke's personal checking account which was maintained at Bunny's Superette. See T. Burke Exhibit F (check registers).

Marie Burke also purchased properties at 108 Liberty Street and 100 Webster Street after Bernard Burke passed away. Despite Edward Burke's testimony that Bunny's Superette made the down payments (and paid expenses associated with maintaining these properties), the loan settlement statements reveal that payment for these properties was made exclusively by Marie Burke. See T. Burke Exhibits at C and D (loan settlement statements). Marie Burke provided a \$9,112.50 deposit on the property at 100 Webster Street, which was obtained on March 21, 1974 from the refinancing of her property at 68 Webster Street. See T. Burke Exhibit C. Marie Burke also provided an \$8,880.00 deposit on the property at 108 Liberty Street, which was obtained on September 22, 1977 from an additional refinancing of her property at 68 Webster Street. See T. Burke Exhibit D. There is no evidence that any funds were provided by Bunny's Superette.

In 1987, Marie Burke decided to sell the properties located at 100 Webster Street and 18 Rockland Avenue. The proceeds from these sales were ultimately deposited into Marie Burke's investment account. None of these proceeds were given to any of her children and/or to Bunny's Superette. Edward Burke's request for a portion of the sales proceeds was denied.

C. Edward Burke and Thomas Burke's Continued Employment At Bunny's Superette After 1971

After Bernard Burke passed away, Edward and Thomas Burke managed Bunny's Superette for many years. Edward Burke was mainly involved in the financial aspects of the

required to make a gift). "The donor must intend to relinquish the right of dominion over the property and to create such a right in the donee." 38 Am. Jur. 2d Gifts § 18 (1999); DeGrandpre, 7 New Hampshire Practice: Wills, Trusts and Gifts, 3d Ed., § 37-4 (citing Harriman v. Bunker, 79 N.H. 127, 128 (1919)). The most relevant evidence of donative intent is the donor's own testimony. 38 Am. Jur. 2d Gifts, § 19 (1999). Here, there is no evidence that Marie Burke ever intended to gift all of the properties that she owned.

business and Thomas Burke was involved in the operation of the stores. Edward and Thomas Burke set their salaries each year, and the uncontroverted testimony was that both Edward and Thomas received the same salary. The profitability of the business fluctuated every year, and any profits that remained in the business at the end of the year were shared equally by Edward and Thomas (to avoid corporate taxation). For several years, the business was extremely successful. Between the years 1980 and 1985, the parties earned an annual income that ranged from \$61,000 to \$77,000. See T. Burke Exhibit B. There were also years, however, that were less successful. For example, between the years 1993 and 1995, the parties earned an annual income that ranged between 30,000 and \$39,000. See id. The assets of the store did not have much value. The real value in Bunny's Superette was in year to year operation of store. Although Marie Burke and Bernardine Donelson each received a small distribution for several years, these distributions were inconsequential in comparison to the amounts received by Edward Burke and Thomas Burke.

Over the years, Edward Burke's relationship with his family deteriorated. Marie Burke, Bernardine Donelson and Thomas Burke were never close to Nancy Burke, Edward Burke's wife. Although Marie Burke spent time with Edward Burke's children during their youth, the children also grew distant as they reached adulthood. By the 1990s, Edward Burke only rarely saw the other members of his family.

In 1996, Edward Burke left the business. Prior to that time, he had started another grocery business called "Jon O's Market, Inc." in Manchester, New Hampshire. Thomas Burke testified that Edward Burke had been taking items out of the store to stock his new grocery store, and Thomas Burke became concerned that the business would fail. In January or February of 1996, Edward Burke accused Thomas Burke of stealing from Bunny's Superette. Edward Burke

walked out of the store, and never returned to work. Edward Burke has maintained a distant relationship with Marie Burke and Bernardine Donelson since that time. He no longer visits them, he does not correspond with them and he does not talk to them at social and/or family events. In fact, Marie Burke and Bernardine Donelson have never met Edward Burke's grandchildren.

D. Marie Burke's Estate Plan

In 1999, Marie Burke created a revocable trust which provided for the distribution of her estate at her death. See Plaintiff's Exhibit 1 (Marie I. Burke Revocable Trust Agreement). In this document, Marie Burke does not treat her children equally. Bunny's Superette stock and related business real estate were to be distributed to Thomas Burke. Thomas Burke did not participate in the creation of this trust, or in any other estate planning documents which Marie Burke signed in 1999. Marie Burke did not give any of her children copies of these documents to review. Marie Burke transferred her real estate and her stock in Bunny's Superette to her trust at this time.

In March of 2004, Marie Burke, as the Trustee of the Marie I. Burke Revocable Trust, gifted the properties associated with Bunny's Superette to Thomas Burke. See T. Burke Exhibit G and H. Marie Burke testified that the decision to gift these properties was based upon her concern that Edward Burke would contest her estate after she passed away. The decision to gift these properties was made solely by Marie Burke, and there was no evidence that Thomas Burke improperly influenced and/or manipulated his mother to make these gifts.

In April of 2004, Marie Burke and Bernardine Donelson gifted their interest in Bunny's Superette to Thomas Burke. See T. Burke Exhibit I. Thomas Burke did not give any consideration to Marie Burke or to Bernardine Donelson in exchange for these gifts. Also in

April of 2004, Marie Burke amended her trust, changing the gifts to each of her three children. See Plaintiff's Exhibit 2 (First Amendment to the Marie I. Burke Revocable Trust).

On or around June 4, 2005, Edward Burke filed a Petition for Injunctive Relief. Marie Burke subsequently amended her trust to remove her gift to Edward Burke. See Plaintiff's Exhibit 3 (Second Amendment to the Marie I. Burke Revocable Trust). At his mother's request, Thomas Burke made an appointment for Marie Burke to meet with Attorney Ruth Ansell and drove her to the appointment. He did not participate in the changes made to her estate plan.

In response to a subpoena issued by counsel for Edward Burke, over the objection of Marie Burke, copies of her Will, Trust and various estate planning documents were given to each of her children. Marie Burke is a private person and she had never shared copies of these documents with her children prior to this time.

ARGUMENT

At trial, Edward Burke claimed that: (1) he was verbally promised by his father that he was a co-owner of the property and/or that someday he would inherit the business, land and building; (2) he entered into an agreement with Marie Burke, Bernardine Donelson and Thomas Burke that the Burke children would equally own the business, land and building; and (3) the transfers of stock by his mother and sister to Thomas Burke were not gifts. Only the testimony of Edward Burke, without written evidence, was presented in support of these claims. The defendants dispute all three claims.

I. The Transfer Of Shares From Marie Burke and Bernardine Donelson To Thomas Burke Was Proper

A. The Transfer of Shares By Gift Does Not Violate The Clear And Unambiguous Language Of The Stock Restriction

It is well accepted that “[t]he interpretation of a contract, including whether a contract term is ambiguous, is ultimately a question of law for this court to decide.” Appeal of Reid, 143 N.H. 246, 249 (1998) (quotation omitted). In interpreting a contract, a court must give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole. Absent ambiguity, however, the parties’ intent will be determined from the plain meaning of the language used in the contract. Id. at 336-37 (quotations and citation omitted) (emphasis added). As discussed below, the unambiguous language of the stock restriction does not prohibit the transfer of shares by gift.

The stock restriction provides that “[i]n the event that any stockholder during his lifetime desires to sell any of his stock, he shall . . . offer it . . . to the other stockholders” Petition for Injunction at Exhibit B (record of incorporation) (emphasis added). The vast majority of courts have concluded that the transfer of property by gift does not trigger a right of refusal based upon contractual language which contemplates a “sale” or a decision to “sell.” See e.g., Rainbow Oil Co. v. Christmann, 656 P.2d 538 (Wyo. 1982) (holding that gift of property was not a “sale” within the purview of the right of refusal provision in the contract); McLeod v. Sandy Island Corp., 216 S.E.2d 746 (S.C. 1975) (same); Isaacson v. First Security Bank, 511 P.2d 269 (Idaho 1973) (same); Park Station v. Bosse, 835 A.2d 646 (Md. App. 2003) (same); Bennett v. Dove, 277 S.E.2d 617 (W.Va. App. 1981) (same); Mericle v. Wolf, 562 A.2d 364 (Pa. Super.

1989) (same).³ The rationale underlying these cases is that the term "sell" is commonly and ordinarily used to mean "[t]o transfer title or possession of property to another in exchange for valuable consideration." Black's Law Dictionary 1360 (6th ed.1990). In contrast, the term "gift" is commonly and ordinarily used to mean "[a] voluntary transfer of property to another made gratuitously and without consideration." *Id.* at 688; see also *Curriden v. Chandler*, 79 N.H. 269 (1919) (holding that a gift is "a voluntary transfer of his property by one to another, without any consideration or compensation therefore"). In other words, the conveyance of property by gift or donation is not a "sale" within the meaning of the contract.

The stock restriction applicable to this case explicitly requires a sale at an agreed price⁴, not a mere conveyance, before the corporation and/or stockholder's right to purchase the shares became effective. A conveyance alone does not trigger the terms of the stock restriction, but instead the stock restriction applies only when the stock is offered for sale by any stockholder. Since Marie Burke and Bernardine Donelson both gifted their twenty-five shares of stock to Thomas Burke, the stock restriction is inapplicable.

B. There Is Insufficient Evidence To Support A Determination That The Transfer Of Shares Was Not A Gift

During trial, Edward Burke failed to submit any evidence to prove that Marie Burke and Bernardine Donelson had received any consideration for their gift of shares to Thomas Burke. There was also no evidence to prove that Marie Burke or Bernardine Donelson made the gift as a result of undue influence by anyone.

³ Copies of these out-of-state opinions were attached to the Memorandum of Law in Support of Motion for Summary Judgment as Exhibit 2.

⁴ Each of the parties testified that no agreed price was ever established for the stock.

II. The Plaintiff May Not Rely On Alleged Statements Which He Claims Granted Him An Ownership Interest And/Or Right To Future Inheritance

A. Any Alleged Promises Made By Bernard Burke Are Unenforceable Under The Statute Of Limitations

At trial, Edward Burke testified that his father told him during his youth that Edward Burke was a co-owner of Bunny's Superette, and that he would ultimately inherit the store. It is unclear whether Edward Burke is now relying on this statement to support the claims brought in the Petition for Injunctive Relief. To the extent that Edward Burke is relying on any statements made by his father, this issue was not properly pled. The plaintiff has never sought to amend his Petition for Injunctive Relief to allege this new claim. It is axiomatic "that a defendant is entitled to be informed of the theory on which the plaintiffs are proceeding and the redress that they claim as a result of the defendant's actions." Kravitz v. Beech Hill Hosp., L.L.C., 148 N.H. 383, 392-393 (2002). At this point, the allowance of this new claim should not be permitted because a trial court should only permit an "amendment of pleadings so long as the changes do not surprise the opposite party, introduce an entirely new cause of action, or call for substantially different evidence." Id. (quotations omitted).

Edward Burke also should not be permitted to rely on any statements made by his father in support of his argument that he is entitled to inherit the store, buildings and land because the statute of limitations for such a claim has long passed. Under New Hampshire law, there is a one year statute of limitations for making such claims. See RSA 556:5.5 To the extent that Edward Burke wanted to contest the distribution of Bernard Burke's probate estate, the appropriate timeframe was over thirty years ago.

⁵ Although RSA 556:28 provides a mechanism by which the statute of limitations can be extended, the plaintiff has not made such a claim.

B. The Parol Evidence Rule Bars Admission Or Consideration Of Verbal Agreements Made Before The Incorporation Of Bunny's Superette Because The Written Incorporation Documents (Including The Stock Restriction) Are Unambiguous And Must Be Construed In Accordance With Its Plain Meaning

Edward Burke also attempts to avoid the unambiguous language of the written stock restriction which was adopted at the organizational meeting on June 28, 1971 by relying on disputed verbal agreements which were made before the written agreement. The plaintiff's reliance on these verbal agreements is unavailing because he cannot overcome the plain language of the stock restriction by using parol evidence.

The New Hampshire Supreme Court has firmly established that in construing the terms of a contract, the document is expected to speak for itself. It is "axiomatic" that the meaning of a contract is ultimately a matter of law, and that in reviewing a contract, its language will be given the interpretation that best reflects the parties' intentions at the time the contract was written. See General Linen Services v. Franconia Investment Associates, 150 N.H. 595, 597 (2004); see also Butler v. Walker Power, Inc., 137 N.H. 432, 435 (1993). Where the written document is not ambiguous, "the parties' intent will be determined from the plain meaning of the language used in the contract." Robbins v. Salem Radiology, 145 N.H. 415, 418 (2000) (emphasis added); see also Parkhurst v. Gibson (Parkhurst), 133 N.H. 57, 62 (1990) (holding that "[t]he parol evidence rule cautions us that absent . . . ambiguity, we must restrict our search for the parties' intent to the words of the contract"); Appeal of Durham, 149 N.H. 486, 488 (2003) (holding that if the contract is not ambiguous, its meaning will be ascertained without reference to any extrinsic evidence or practices of the parties which might be inconsistent with the terms of the contract). The purpose of the parol evidence rule is to prevent exactly this type of situation, where a party

seeks to contradict the plain language of a written agreement by relying on disputed verbal agreements.

In this case, the unambiguous language of the incorporation documents (which include the written stock restriction) should control the parties' ability to transfer shares. The plaintiff instead seeks to rely on uncorroborated verbal agreements which were made before the parties entered into the written agreement. These alleged verbal agreements are inconsistent with the plain and unambiguous language contained in the written documents. At the organizational meeting of the corporation which was held on June 28, 1971, it was resolved that twenty-five (25) shares of the stock would be issued each to Marie Burke, Bernardine Donelson, Edward Burke and Thomas Burke. The written stock restriction further states:

In the event that any stockholder during his lifetime desires to sell any of his stock, he shall first offer it or such part of it as he wishes to sell, to the corporation at the 'agreed price' . . . and the corporation shall have sixty (60) days to accept or reject the offer. If the corporation rejects the offer, the offer shall be repeated to the other stockholders in proportion to their holders and said stockholders shall have sixty (60) days to accept or reject the offer. If the other stockholders reject the offer, then the holder shall be free to sell said stock to any other party, which party shall take subject to this restriction.

Petition for Injunction at Exhibit B (record of organization) There is no language in the written stock restriction which supports an argument that Thomas Burke, Bernardine Donelson and Edward Burke entered into an agreement that they would be treated equally with respect to their parents' estate. To the contrary, the written stock restriction sets forth the procedure by which the shareholders are able to sell their shares to the corporation, its shareholders, other individuals and/or entities.

III. The Plaintiff Has Failed To Set Forth Sufficient Evidence To Support A Determination That He Is Entitled To Any Of The Properties Owned By Marie Burke And/Or Bernard Burke⁶

A. The Plaintiff May Not Rely On Verbal Agreements Which Violate The Statute Of Frauds

Under New Hampshire law, the statute of frauds provides that “[n]o action shall be maintained upon a contract for the sale of land unless the agreement upon which it is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person authorized by him in writing.” RSA 506:1. Based on the foregoing, “[o]ral contracts to devise real property as compensation for personal services are ordinarily unenforceable under the statute of frauds.” Tsiatsios v. Tsiasios, 140 N.H. 173, 176 (1995); see also Knox v. Allard, 90 N.H. 157 (1939); Southern v. Kittredge, 85 N.H. 307 (1932); Ham v. Goodrich, 37 N.H. 185 (1858); Crawford v. Parsons, 18 N.H. 293 (1846) (overruled on other grounds). The purpose of the rule is to “promote certainty and to protect from frauds and perjuries in land transactions.” Weale v. Massachusetts Gen. Housing Corp., 117 N.H. 428, 431 (1977).

An oral contract to devise real property in exchange for services will fall outside the statute of frauds in only extremely limited circumstances such as “when some operating facts, such as fraud, part performance or other equitable considerations, are present.” Id. Although the part performance may remove an oral agreement from the statute of frauds, it is necessary for the party to be placed in a situation that will operate as a fraud upon him if the agreement is not performed. See Southern v. Kittredge, 85 N.H. 307 (1932).

⁶ At trial, the defendants objected to the introduction of evidence relating to the properties owned by Marie Burke to the extent that it was being admitted for the purpose of obtaining equitable and/or legal relief with respect to these properties. The foundation of this objection was based upon the fact that the relief sought in the Petition for Injunction related to stock (which did not include the properties). The Petition for Injunction never set forth any request for equitable and/or legal relief with respect to the plaintiff's alleged entitlement to his parent's properties and/or inheritance. In light of the fact that the defendants' objection was already raised at trial, the defendants will not repeat the objections which were already made on the record at trial.

In the case Tsiatsios v. Tsiatsios, 140 N.H. 173 (1995), for example, the New Hampshire Supreme Court held that an oral agreement to devise real property fell outside of statute of frauds where the clear and convincing evidence was that (1) the decedent repeatedly promised to bequeath a farm and motel to his children when he died if they worked without compensation; (2) the decedent's four children spent their childhoods and adult lives working on decedent's farm and motel without any compensation; (3) the children's reliance on the promise was detrimental because the work on the farm and motel precluded them from playing sports, joining clubs, going to movies, and attending dances; and (4) the children fully performed the contract. See id. at 174-176. Unlike that case, the plaintiff has failed to set forth facts to support a determination that the oral agreement falls outside the statute of frauds.

First and most importantly, the plaintiff does not allege that he was promised the business, land and building in exchange for his performance of services. He admits that performance of services was not exchanged for ownership. He acknowledges that Bernardine Donelson did not continue to work at the store, and under his alleged agreement, continued to share an equal interest in the business and estate. Similarly, Edward Burke has not worked at the store since 1996. The plaintiff simply alleges that it was agreed that Bunny's Superette stock, land and building (and other properties bought later) would belong to the three children equally after their parents' deaths. Since the alleged oral agreement was not contingent upon the plaintiff's future provision of personal services, Edward Burke cannot claim that his continued work was in reliance on the agreement.

What is more, even assuming that the plaintiff was promised the business, land and buildings in exchange for his services, this case also differs significantly from the case Tsiatsios

v. Tsiatsios, 140 N.H. 173, 176 (1995) because the plaintiff received compensation for his work at the business since 1966.

Based on the foregoing, the plaintiff has failed to set forth sufficient evidence to support a determination that the facts and circumstances of this case fall outside the statute of frauds.

CONCLUSION

The Plaintiff claims to be entitled to a share of his parents' estates on the basis of an unproven agreement made more than thirty years ago, notwithstanding his admitted alienation from his family for many decades. His claims will not restore his place in the family. For the reasons explained herein, Marie Burke and Bernardine Donelson respectfully requests that the Court grant judgment in their favor.

Respectfully submitted,


**MARIE I. BURKE AND
BERNARDINE DONELSON**

By their attorneys,

ANSELL & ANDERSON, P. A.

Dated: June 27, 2005


By:



Ruth Tolf Ansell, Esquire
40 South River Road, unit 32
Bedford, NH 03110
(603) 664-8211

CERTIFICATE OF SERVICE

I hereby certify on this 27th day of June 2005, a copy of the foregoing was mailed to Vincent A. Weners, Jr., Esquire, counsel for Edward J. Burke, James A. Normand, Esquire, counsel for Bunny's Superette, Inc., Ovide M. Lamontagne, Esquire and Danielle L. Pacik, Esquire, counsel for Thomas M. Burke..



Ruth Tolf Ansell Esquire

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

Docket No. 04-E-0251

Edward J. Burke

vs.

Bunny's Superette, Inc., Thomas M. Burke, Marie I. Burke
and Bernardine P. Donelson

**RESPONDENT THOMAS M. BURKE'S (1) MOTION TO JOIN POST-TRIAL
MEMORANDUM SUBMITTED BY MARIE BURKE AND BERNARDINE DONELSON
AND (2) POST-TRIAL MEMORANDUM**

NOW COMES the Respondent, Thomas M. Burke, by and through his attorneys,
Devine, Millimet & Branch, Professional Association, and respectfully (1) moves to join the
Post-Trial Memorandum submitted by Marie Burke and Bernardine Donelson and (2) submits
this post-trial memorandum with respect to issues pertaining to the Special Meeting held on May
28, 2004:

**A. Motion to Join Post-Trial Memorandum Submitted by Marie Burke and
Bernardine Donelson**

1. On June 27, 2005, Marie Burke and Bernardine Donelson submitted a Post-Trial
Memorandum. All of the issues raised in the Post-Trial Memorandum Submitted by Marie
Burke and Bernardine Donelson apply equally to the claims brought against Thomas Burke.
Accordingly, Thomas Burke moves to join in their Post-Trial Memorandum.

**B. Post-Trial Memorandum Submitted By Thomas Burke Relating To Special Meeting
Held On May 28, 2004**

2. In his Petition for Injunction, Edward Burke requested in his prayer for relief that
the Court permanently enjoin Bunny's Superette from calling a Special Meeting. See Petition

for Injunction, Prayer for Relief at ¶B. As set forth herein, the Court should deny this request for relief because the Special Meeting was lawfully held.

3. On May 28, 2004, Thomas Burke held a Special Meeting for the purpose of reducing the number of persons who are to serve as directors for the Company, to elect himself as the sole Director, to approve and authorize the amendment to and restatement of the existing Articles of Incorporation of the Company, and to approve and authorize the amendment to and restatement of the existing By-laws of the Company. See T. Burke Exhibit J (Special Meeting documents). At the Special Meeting, Thomas Burke also entered into a Consent Resolution which elected new officers (Marie Burke as President, Bernardine Donelson as Vice President and Thomas Burke as Treasurer and Secretary). See id.

4. There is nothing in the by-laws which prevented Thomas Burke from conducting the Special Meeting.¹ See Petition for Injunction at Exhibit B (By-Laws). What is more, the Special Meeting did not affect Edward Burke's ownership interest in Bunny's Superette, as it is undisputed that Edward Burke still owns a 25% interest in the company.

Respectfully submitted,.

THOMAS M. BURKE

By his attorneys,

**DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION**

Dated: June 27, 2005

By:

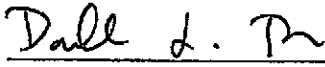
Dall L R

Ovide M. Lamontagne, Esquire
Danielle L. Pacik, Esquire
111 Amherst Street
Manchester, NH 03101
(603) 669-1000

¹ It also bears noting that Edward Burke failed to present any evidence at trial which would support a determination that the Special Meeting was not lawfully held.

CERTIFICATE OF SERVICE

I hereby certify on this 27th day of June 2005, a copy of the foregoing Motion to Join Post-Trial Memorandum Submitted by Marie Burke and Bernardine Donelson and (2) Post-Trial Memorandum was delivered via facsimile and first class mail to Vincent A. Wengers, Jr., Esquire, counsel for Edward J. Burke, James A. Normand, Esquire, counsel for Bunny's Superette, Inc., and Ruth Tolf Ansell, Esquire, counsel for Marie I. Burke and Bernardine P. Donelson.



Danielle L. Pacik, Esquire

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THE STATE OF NEW HAMPSHIRE
HILLSBOROUGH, SUPERIOR COURT
NORTHERN DISTRICT

Docket No. 04-E-0251

Edward J. Burke

vs.

Bunny's Superette, Inc., Thomas M. Burke, Marie I. Burke and Bernardine P. Donelson

SUPPLEMENTAL POST-TRIAL MEMORANDUM SUBMITTED BY
MARIE I. BURKE AND BERNARDINE P. DONELSON

NOW COME Respondents, Marie I. Burke and Bernardine P. Donelson, by and through their attorneys, Ansell & Anderson, P.A., and respectfully submit the following Supplemental Post-Trial Memorandum in Response to the Plaintiff's Memorandum of Law:

I. UNDUE INFLUENCE

Prior to the Trial in this matter, the Plaintiff had alleged that the gift of stock in Bunny's Superette from Marie I. Burke and Bernardine P. Donelson to Thomas M. Burke violated the express stock transfer agreement included in the Organization Meeting of the corporation and/or an oral agreement among the parties and/or among the Plaintiff and Bernard Burke relating to the ownership of the business and all assets which resulted from the earning of the business to both Marie I. Burke and to Bernard Burke. In his post-trial Memorandum of Law, a lengthy statement of facts not entirely supported by testimony at the Trial is given in support for these various theories.¹ For the first time, however, in his post-trial Memorandum of Law, the Plaintiff directly

¹ This Supplemental Memorandum focuses on those significant factual and legal issues which were not addressed in the Defendants' Post-Trial Memorandum. The Defendants dispute

challenges the validity of Marie I. Burke's Will, Trust, Amendments, Deed and other documents on the grounds that she was unduly influenced by Thomas M. Burke and/or that she was incompetent when these documents were signed in 1999 and 2004.

The Plaintiff testified that he had no contact with his mother, Marie I. Burke, in any years between 1996 and the commencement of this action. Accordingly, he had no knowledge of her mental capacity in 1999 or in 2004 at the time that these documents were signed. He presented no evidence that Marie I. Burke's estate planning documents were invalid. The Plaintiff's creative narrative of "facts" in the Memorandum of Law does not make them true.

Since this issue was not raised prior to Trial, and has no bearing on the issues which were before the Court, no independent witnesses were brought to refute the Plaintiff's allegations that any of Marie I. Burke's estate planning documents were invalid. Contrary to the Plaintiff's assertions, however, Marie I. Burke testified that Thomas Burke was not permitted to participate in the estate planning discussions, whether held in the offices of the Devine law firm, or in the offices of Attorney Ansell. Both Marie I. Burke and Thomas M. Burke testified that he was never present when these documents were discussed or signed. She also testified that after a few

a number of aspects of the Plaintiff's recitation of facts. For example, Edward Burke's Memorandum includes a lengthy section addressing the insolvency of Bernard Burke's estate. See Plaintiff's Memorandum of Law at Part 1, Section 3 ("Marie Burke's estate is the fruit of Bunny's Market.") At Trial, Edward Burke testified that his father's estate was insolvent, but admitted that he had never seen the probate records for his father's estate. The certified copy of Bernard Burke's probate records make it very clear that Bernard Burke jointly owned a significant amount of real estate with his wife, Marie I. Burke, and that the vast majority of his debt consisted of long-term bank debt which was ultimately paid. If Thomas M. Burke and Edward Burke had both decided to quit working at the store after the death of Bernard Burke, Marie I. Burke could have managed the store (she was only then in her early 50s), hired a manager for the store, or sold the business, continuing to receive rental income from her real estate. Continued operation of the store after the death of Bernard Burke primarily benefitted her sons who were paid to be the managers.

other gifts, Thomas was to get the Bunny's Superette stock and associated buildings, Edward was to get nothing, and Bunny was to receive the balance of her estate. She knew that she and Bernardine P. Donelson had given their stock to Thomas M. Burke. She knew that she had given the store real estate to Thomas M. Burke. Her testimony reflected a good understanding of her estate plan, notwithstanding her current age, the passage of time since these documents were signed, and the difficulty of discussing these private issues in the midst of an emotionally difficult Trial brought by her eldest son. The fact that she was unable to identify and describe legal documents is irrelevant if she understands their import. Her testimony was sufficient to withstand a challenge to their validity.

If testimony had been given about Marie I. Burke's mental capacity and independent thought with respect to her estate plan, everyone in the Courtroom would have concluded that Marie I. Burke was competent to execute the documents at the time of signature, free from undue influence by anyone. Since these issues were never pled by the Plaintiff prior to the Trial, however, they are not appropriate issues to be addressed at this time.

Plaintiff requests that various estate planning documents executed by Marie I. Burke (including her Will, Trust, Trust Amendments and gift Deed) be set aside or reformed, or that a constructive trust be imposed on Marie I. Burke's estate, even while she is alive. These requests were similarly not pled prior to the Trial. Plaintiff's arguments for relief are without merit, based on a distorted presentation of facts not in evidence in this matter.

II. CONSIDERATION FOR TRANSFER OF STOCK

The Plaintiff's Memorandum of Law suggests that consideration was paid for the transfer of Bunny's Superette stock to Thomas M. Burke. In addition to many unsubstantiated estimates of the value of the property owned by Marie I. Burke, the Plaintiff alleges facts that Thomas M. Burke and Bernardine P. Donelson "must have known" or that "she must have been promised something...." notwithstanding their direct testimony to the opposite. He suggests that Bernardine P. Donelson transferred her stock to Thomas M. Burke in exchange for an interest in their mother's estate, ignoring the obvious fact that the residuary Trust estate was to be distributed to Bernardine P. Donelson under the 1999 Trust agreement, executed five years prior to her gift. Even with Plaintiff's imaginative interpretation of the facts, he has not alleged that Marie I. Burke received any consideration for the transfer of stock to Thomas M. Burke. He suggests Marie I. Burke's other gifts to Thomas M. Burke (by deed and trust amendment) somehow constituted consideration paid to Marie I. Burke.

It should be noted that the Plaintiff acknowledges in his argument relating to the Parole Evidence Rule that "[t]he Stock Restriction Agreement covers only a sale.... [T]he agreement by its terms does not cover a gift...." Since the transfers in questions were gifts, they are not barred by the Stock Restriction Agreement.

III. THE FIDUCIARY DUTY OF A DE FACTO ATTORNEY

The Plaintiff's Memorandum of Law incorrectly references the standard which applies when an attorney-in-fact, acting in a fiduciary capacity under a power of attorney, makes a gift to himself on behalf of the principal. This standard is not applicable to a gift made directly by a

principal (Marie I. Burke) to her attorney-in-fact (Thomas M. Burke). The Plaintiff cites no case, statute or treatise which recognizes the fiduciary position or applicable standard for a "de facto attorney."

IV. UNIFORM FRAUDULENT TRANSFER ACT

The Plaintiff has failed to establish any basis for the Court to set aside the 2004 gift of real estate from Marie I. Burke to Thomas M. Burke under the fraudulent transfer act or any other theory. Thomas M. Burke was to receive the real estate under Marie I. Burke's Trust. She decided to make this gift during her lifetime. Only the timing of the gift was changed and not the ultimate owner. There is no basis to set aside the transfer.

The Plaintiff failed to request this relief prior to the Trial. His April 20, 2005 Motion to Amend his Petition for Injunction raised the land issue for the first time: "the Plaintiff has been caused the loss of his share in the business, land and buildings and his parents' estates." The Plaintiff's Motion to Amend was denied by this Court on May 13, 2005, noting that the Petitioner did "in his initial pleadings, advance a claim for money damages caused, allegedly, by the Defendants' breach of contract." The Plaintiff request for money damages did not include a request that the conveyance be set aside, or that a constructive trust should be created.

V. REQUESTED RELIEF

All of the Plaintiff's requests should be denied. The Plaintiff has demonstrated no foundation for his Petition other than acrimony for the balance of his family and he should bear the cost of his frivolous lawsuit. Defendants request that reasonable costs and attorney fees should be awarded to them.

CONCLUSION

For the reasons explained herein, Marie Burke and Bernardine Donelson respectfully requests that the Court grant judgment in their favor.

Respectfully submitted,

MARIE I. BURKE AND

BERNARDINE DONELSON

By their attorneys,

ANSELL & ANDERSON, P. A.

Dated: July 5, 2005

By: 

Ruth Tolf Ansell, Esquire
40 South River Road, unit 32
Bedford, NH 03110
(603) 664-8211

CERTIFICATE OF SERVICE

I hereby certify on this 5 day of July 2005, a copy of the foregoing was mailed to Vincent A. Widders, Jr., Esquire, counsel for Edward J. Burke, James A. Normand, Esquire, counsel for Bunny's Superette, Inc., Ovide M. Lamontagne, Esquire and Danielle L. Pacik, Esquire, counsel for Thomas M. Burke..



Ruth Tolf Ansell Esquire

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

Docket No. 04-E-0251

Edward J. Burke

vs.

Bunny's Superette, Inc., Thomas M. Burke, Marie I. Burke
and Bernardine P. Donelson

**RESPONDENT THOMAS M. BURKE'S MOTION TO JOIN
SUPPLEMENTAL POST-TRIAL MEMORANDUM SUBMITTED BY
MARIE BURKE AND BERNARDINE DONELSON**

NOW COMES the Respondent, Thomas M. Burke, by and through his attorneys,
Devine, Millimet & Branch, Professional Association, and respectfully moves to join the
Supplemental Post-Trial Memorandum submitted by Marie Burke and Bernardine Donelson and
in support thereof, states as follows:

1. On July 6, 2005, Marie Burke and Bernardine Donelson submitted a
Supplemental Post-Trial Memorandum. All of the issues raised in the Supplemental Post-Trial
Memorandum Submitted by Marie Burke and Bernardine Donelson apply equally to the claims
brought against Thomas Burke. Accordingly, Thomas Burke moves to join in their
Supplemental Post-Trial Memorandum.

Respectfully submitted,


THOMAS M. BURKE

By his attorneys,

**DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION**

Dated: July 6, 2005

By:


Ovide M. Lamontagne, Esquire
Danielle L. Pacik, Esquire
111 Amherst Street
Manchester, NH 03101
(603) 669-1000

CERTIFICATE OF SERVICE

I hereby certify on this 6th day of July 2005, a copy of the foregoing Motion to Join Supplemental Post-Trial Memorandum Submitted by Marie Burke and Bernardine Donelson was delivered via first class mail to Vincent A. Wenners, Jr., Esquire, counsel for Edward J. Burke, James A. Normand, Esquire, counsel for Bunny's Superette, Inc., and Ruth Tolf Ansell, Esquire, counsel for Marie I. Burke and Bernardine P. Donelson.


Danielle L. Pacik, Esquire

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